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Time Online Dotcom Bhd v Bates (Malaysia) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO S6–25–1 OF 2004

ABDUL MALIK ISHAK J

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16 MAY 2005

Civil Procedure — Transfer of action — From subordinate court to High Court — Application for — Grounds of application — Applicant believed sum awarded would exceed RM250,000 — Applicant sought agreement of respondent to proceed case in sessions court even though case may exceed monetary limit of RM250,000 — Refusal of respondent to allow case to proceed in sessions court — Whether applicant entitled to have case adjudicated upon in the right and proper forum — Subordinate Courts Act 1948 s 65(3)

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The applicant sought to transfer the proceedings in the Kuala Lumpur sessions court ('the said suit') to the Kuala Lumpur High Court on the ground that the applicant's counterclaim in the said suit may exceed the monetary limit of RM250,000 prescribed to the sessions court. The said suit was filed by the respondent in the Kuala Lumpur sessions court claiming for the sum of RM200,000. The respondent's claim was allegedly for the balance of payment for a television commercial advertisement commissioned by the applicant to the respondent. The applicant filed a defence and counterclaim for, *inter alia*: (1) the return of the sum of RM200,000 which was already paid to the respondent; (2) loss and damage suffered by the applicant; and (3) the applicant believed that the sum that would be awarded under the counterclaim would exceed the sum of RM250,000.

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Held, allowing the application:

(1) Pursuant to s 65(3) of the Subordinate Courts Act 1948, the applicant's solicitors had by way of a letter to the respondent's solicitors requested for the respondent's agreement to allow the sessions court to try the said suit even though the amount of the applicant's counterclaim may exceed RM250,000. This proposal was rejected by the respondent. In the same letter, the solicitors for the respondent informed the applicant to proceed with the filing of the application to the High Court. It was on this basis that this application was filed by the applicant, ie the transfer application was filed after the respondent refused to agree to allow the sessions court to try the said suit (see para 25 and 28).

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(2) The applicant was entitled to have its counterclaim adjudicated upon in the right and proper forum. If the quantum of the applicant's counterclaim far exceeded the sum of RM250,000 the applicant cannot be shackled by the respondent. The High Court was indeed the right forum to adjudicate the applicant's counterclaim (see para 26).

I

[**Bahasa Malaysia summary**

Pemohon memohon untuk memindahkan prosiding ke mahkamah sesyen Kuala Lumpur ('guaman itu') atas sebab bahawa tuntutan balas pemohon mungkin melebihi had kewangan maksimum sebanyak RM250,000 yang diperuntukkan kepada mahkamah sesyen. Guaman itu difailkan oleh responden di mahkamah sesyen yang menuntut untuk jumlah RM200,000. Tuntutan responden dikatakan untuk baki pembayaran bagi suatu iklan komersial televisyen yang dikomisen oleh pemohon kepada responden. Pemohon memfailkan pembelaan dan tuntutan balas untuk, *inter alia*: (1) pemulangan jumlah RM200,000 yang telah dibayar kepada responden; (2) kerugian dan gantirugi yang dialami oleh pemohon; dan (3) perayu berpendapat bahawa jumlah yang akan diawardkan di bawah tuntut balas akan melebihi jumlah RM250,000.

Diputuskan, membenarkan permohonan itu:

(1) Mengikut peruntukkan s 65(3) Akta Mahkamah Rendah 1948, peguam pemohon telah melalui sepucuk surat kepada peguam responden memohon persetujuan responden supaya guaman itu dibicarakan di hadapan mahkamah sesyen walaupun jumlah tuntut balas pemohon mungkin melebihi RM250,000. Cadangan ini ditolak oleh responden. Dalam surat yang sama, peguam responden memaklumkan kepada pemohon supaya meneruskan pemfailan permohonan itu ke Mahkamah Tinggi. Atas sebab ini permohonan telah difailkan oleh pemohon, ie permohonan pemindahan ini difailkan selepas responden membantah kepada pembicaraan guaman ini di mahkamah sesyen (lihat perenggan 25 dan 28).

(2) Pemohon berhak untuk mendapatkan penghukuman tuntutan balasnya di forum yang betul dan sesuai. Sekiranya jumlah tuntutan balas pemohon jauh melebihi jumlah RM250,000, pemohon tidak boleh dibelenggu oleh responden. Mahkamah Tinggi memang adalah forum yang betul untuk memberi penghukuman kepada tuntut balas pemohon (lihat perenggan 26).]

Notes

For a case on transfer of action from subordinate court to High Court, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 6388.

Cases referred to

Beddall v Maitland (1881) 17 Ch D 174 (refd)
Country Heights Marketing v. Firstland Management [1997] MLJU 339 (refd)
Dynacast (S) Pte Ltd v Lira Meng Siang & Ors [1989] 3 MLJ 456 (refd)
Savings and Investment Bank Ltd v Gasco [1984] 1 WLR 271 (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533 (refd)
Wood v Goodwin (1884) WN 17 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 5, O 15 r 3(5)(b), O 19 r 8, O 20 r 3(4), O 21 r 2(2)(b)
Subordinate Courts Act 1948 ss 65(1)(b), (3), (4), 66

Brendan Navin Siva (Intan Nurulfaiza bte Yang Razali with him) (Kadir Andri & Partners) for the applicant/defendant.
Rajendran Packiry (K Mano & Associates) for the respondent/plaintiff.

Abdul Malik Ishak J:

[1] By way of encl one (1), the applicant/defendant sought to transfer the proceedings presently pending in the Kuala Lumpur sessions court vide summons no 7–52–15083 of 2002 (hereinafter referred to as the 'said suit') to the Kuala Lumpur High Court on the ground that the applicant/defendant's counterclaim in the said suit may exceed the monetary limit of RM250,000 prescribed to the sessions court.

THE RESPONDENT/PLAINTIFF'S CLAIM IN THE SAID SUIT

[2] The said suit was filed by the respondent/plaintiff in the Kuala Lumpur sessions court claiming for the sum of RM200,000. The respondent/ plaintiff's claim was allegedly for the balance of payment for a television commercial advertisement commissioned by the applicant/defendant to the respondent/ plaintiff.

THE DEFENCE AND THE COUNTERCLAIM OF THE APPLICANT/DEFENDANT

[3] The applicant/defendant filed a defence and counterclaim dated 15 January 2003 in the said suit and, within a narrow compass, the applicant/defendant's defence and counterclaim may be stated as follows:

(1) it had been represented by the respondent/plaintiff to the applicant/defendant that the former was able to produce and complete the television commercial advertisement in accordance with the specifications and quality required by the applicant/ defendant within three (3) weeks to enable the applicant/ defendant to launch the product as scheduled;

(2) based on these representations made by the respondent/plaintiff to the applicant/defendant, the applicant/defendant entered into an agreement with the respondent/plaintiff on 19 May 2000 for the respondent/plaintiff to produce and complete the television commercial advertisement subject to the specifications provided by the applicant/defendant in accordance to the latter's requirements and to obtain the usual approvals before it was aired;

(3) the total costs for the production and completion of the television commercial advertisement was to be in the sum of RM400,000;

(4) it had been verbally agreed by the parties that the respondent/plaintiff would produce and complete the television commercial advertisement within three (3) weeks to enable the applicant/defendant to launch the service provider, TIMENet, as scheduled;

(5) subsequently, the applicant/defendant had on 30 May 2000 made payment of RM200,000 being the 50% of the total payment of the television commercial advertisement to the respondent/plaintiff;

(6) it was, and it is still, the normal practice in the advertisement industry that the balance of 50% payment would only be paid after the client was satisfied with the final product;

(7) the respondent/plaintiff failed to produce the television commercial advertisement as agreed and based on what had been envisaged and requested by the applicant/defendant;

(8) the television commercial advertisement produced by the respondent/plaintiff was not in accordance with the specifications as requested by the applicant/defendant and it was substantially not of the quality required by the applicant/defendant;

(9) The respondent/plaintiff has not within three (3) weeks or until to date delivered to the applicant/defendant the final product of the television commercial advertisement as required;

(10) the respondent/plaintiff was not ready, nor able nor willing to deliver the television commercial advertisement pursuant to the agreement between the parties and so the respondent/plaintiff had repudiated the said agreement and the applicant/defendant was entitled to elect to accept the said repudiation and to treat the said agreement as coming to an end and therefore the applicant/defendant refused to make further payment to the respondent/plaintiff;

(11) as a result thereto, the launch of the product had to be postponed for nearly three (3) months; and

(12) the applicant/defendant in its counterclaim claimed for the return of the sum of RM200,000 which was already paid to the respondent/plaintiff and the applicant/defendant was also claiming for loss and damage suffered by the applicant/defendant as a result of the delayed launch, namely, loss of rental space, loss of time costs of paying employees, storage costs and loss of profits and the applicant/defendant believed that the sum that would be awarded under the counterclaim would exceed the sum of RM250,000.

COUNTERCLAIM

[4] It is a separate independent action and it may be made in respect of any matter, whenever and however arising. So, a counterclaim may be drafted for a debt accruing or for a liquidated demand or for unliquidated damages or for any other relief or remedy known in law to which the defendant may claim to be entitled (*Beddall v Maitland* (1881) 17 Ch D 174). In terms of quantum, the counterclaim may be more or less than the amount of the plaintiff's claim and it usually arise upon the issuance of the writ (*Wood v Goodwin* (1884) WN 17). Procedurally, in a counterclaim the defendant would be treated as if he were a plaintiff and by this process the defendant may apply to enter judgment against the plaintiff for default of service of a defence to counterclaim as per O 19 r 8 of the Rules of the High Court 1980 ('RHC') or against an added party for default of notice of intention to defend as per O 15 r 3(5)(b) of the RHC or he may even apply for summary judgment on his counterclaim as per of the RHC. It must be borne in mind that a counterclaim may be amended without leave of the court as reflected in O 20 r 3(4) of the RHC and it may even be discontinued or withdrawn without leave of the court as envisaged in O 21 r 2 (2)(b) of the RHC.

ANALYSIS OF THE ARGUMENTS OF THE PARTIES

[5] The respondent/plaintiff argued that the filing of the defence and the counterclaim by the applicant/defendant in the said suit indicated that the applicant/defendant was worried that judgment would be granted against them. By way of a rebuttal to this argument, the applicant/defendant rightly submitted that such a submission was not only baseless in law it was also totally irrelevant to the issue before the court. It was emphasised that the fact that the applicant/defendant need not file the defence and the counterclaim must not be construed to mean that the applicant/defendant was precluded from filing the same. It cannot also be construed to mean that the applicant/defendant was worried that judgment would be entered against them. The applicant/defendant had in fact filed affidavits in opposition to the summary judgment application which raised all the matters pleaded in the defence and the counterclaim. This prompted the respondent/plaintiff to withdraw their application for summary judgment on 12 May 2003.

[6] It was further argued, on behalf of the respondent/plaintiff, that exhs 'KCH–1' to 'KCH–3' of encl 5 showed that the applicant/defendant admitted the debt owed to the respondent/plaintiff. With respect, I have since read exhs 'KCH–1' to 'KCH–3' of encl 5 and I must hold that it was preposterous to say that the applicant/defendant had admitted the debt. In fact, exh 'KCH–1' of encl 5 was a letter issued by the applicant/defendant's solicitors in response to overtures from the respondent/plaintiff's solicitors on the possibility of an amicable settlement. That letter was dated 11 August 2003 and it clearly set out the stand of the applicant/defendant. That letter merely said:

Our clients have instructed us to request that your client puts forward a proposal for the settlement of this matter.

[7] It must be borne in mind that the applicant/defendant was even prepared to consider any proposal for settlement made by the respondent/plaintiff. Such a proposal for settlement was in fact made by the respondent/plaintiff and this can be seen in exh 'KCH–2' of encl 5. But, unfortunately, the proposal was unacceptable to the applicant/defendant and it was conveyed by letter dated 10 October 2003 as reflected in exh 'KCH–3' of encl 5 which was worded in this way:

We write to inform you that our client is not agreeable to the proposal for settlement of this matter as set out in your aforesaid letter.

[8] There was thus no admission of debt by the applicant/defendant There was not even a single hint that the applicant/defendant was admitting liability to the respondent/plaintiff's claim. Indeed if there was any basis to show that the applicant/defendant had admitted the debt, the respondent/plaintiff would have filed an application for judgment based on that admission. Nothing of that sort was ever contemplated by the respondent/plaintiff.

[9] To say as was said by the respondent/plaintiff that the applicant/defendant had no claim or defence against the respondent/plaintiff was indeed baffling. The respondent/plaintiff had not filed an application to strike out the applicant/defendant's statement of defence and counterclaim. The defence and the counterclaim remained on record unimpeded. The only thing which the respondent/plaintiff did was to file an application for summary judgment but the respondent/plaintiff chose to withdraw that application on 12 May 2003 without any prompting.

[10] Now, the reason advanced by the respondent/plaintiff for withdrawing the summary judgment application was even more baffling. At para 6 of encl 5, the respondent/plaintiff said that it withdrew the summary judgment application because they received an indication of settlement from the applicant/defendant's solicitors. This was indeed a blatant lie. It was flatly and categorically denied by the applicant/defendant in para 6 of encl 6. Indeed if this was the only reason for the withdrawal of the summary judgment application why did the respondent/plaintiff not re-filed the summary judgment application once again bearing in mind that there was no settlement to the dispute?

[11] Be that as it may, this court would not, at this juncture, determine the merits or otherwise of the applicant/defendant's defence and the counterclaim. It must be emphasised that the respondent/plaintiff made no attempt whatsoever to strike out the applicant/defendant's counterclaim. At any rate, this was not the proper forum to determine the merits of the applicant/defendant's counterclaim. I shall refrain from doing so.

[12] It was further submitted by the respondent/plaintiff that the quantum claimed by the applicant/defendant in its counterclaim was entirely 'baseless without any proof. With respect, this allegation was completely untrue. The evidence to support the quantum claimed can be seen in the affidavits. The applicant/defendant in its counterclaim was claiming for the return of RM200,000 which was already paid to the respondent/plaintiff. The applicant/defendant was also claiming for loss and damage suffered by the applicant/defendant as a result of the delayed launch. The applicant/defendant was also claiming for loss of rental space, loss of time together with the costs incurred in employing employees as well as storage costs and loss of profits. It was the stand of the applicant/defendant that the sum awarded under the counterclaim would exceed RM250,000. All these can be seen in exhs 'TES–5' and 'TES–6' of encl 4.

[13] An argument was advanced on behalf of the respondent/plaintiff to the effect that the applicant/defendant had not objected to the specification and quality of the respondent/plaintiff's services. Such an argument cannot be considered by this court and must be wholly disregarded because it was not raised in the affidavits. It was a submission from the bar. The significance of filing an affidavit can never be doubted. The purpose of affirming an affidavit is to put before the court the relevant evidence for the court to weigh in a balance the case which is being adjudicated upon. Simply put, an affidavit is an written document averred by a deponent and it contains material and relevant facts or statements relating to the matters in issue. So, it can safely be said that an affidavit constitutes evidence on which the court is required to determine the matter and make the necessary order or give the necessary judgment. Of course, an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof (*Savings and Investment Bank Ltd v Gasco* [1984] 1 WLR 271; and *Dynacast (S) Pte Ltd v Lira Meng Siang & Ors* [1989] 3 MLJ 456). And where material averments contained in an affidavit are not answered or rebutted, the averments must be taken to have been admitted (*Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, FC).

[14] Now, the transfer application was only filed after the respondent/plaintiff refused to agree to allow the sessions court to try the present case. The response of the respondent/plaintiff to this averment was like this. That it had clearly indicated that it was not agreeable to have the present case to be transferred to the High Court. According to the applicant/defendant, this was not true. It was completely untrue. To ascertain the truthfulness or otherwise of the parties averments, it would be ideal to refer to exh 'TES–3' of encl 4 which was a letter emanating from the applicant/defendant's solicitors. That letter was worded in this way:

> We have our client's instructions to inform you that they are of the view that the sum of the counterclaim filed by them exceeds the monetary limit of the sessions court's jurisdiction.

Pursuant to s 65 (3) of the Subordinate Courts Act 1948, we would be grateful for your confirmation in writing whether your client is agreeable to regard the sessions court as having the jurisdiction to try this matter even though the amount of the counterclaim may exceed the value limit of the sessions court's jurisdiction.

In the event that your client agrees to the above, the sessions court would be vested with the jurisdiction to grant judgment for a sum exceeding RM250.000 if that be the case.

[15] That letter as reproduced above was dated 16 January 2004 and it did not mention about having the proceedings transferred to the High Court. That letter merely sought the agreement of the respondent/plaintiff to have the matter dealt with in the sessions court. If the respondent/plaintiff had agreed to this, the matter would have been proceeded with in the sessions court. But the respondent/plaintiff did not agree to this proposal. The respondent/plaintiff's reply in exh 'TES–4' of encl 4 was worded in this way:

We wish to inform you that our clients are not agreeable to the contents as stated in your aforesaid letter.

Therefore kindly proceed to file your client's application (if any) at the High Court.

[16] The abovementioned letter did not indicate that the respondent/plaintiff was not agreeable to the present case or matter being transferred to the High Court. In fact, the abovementioned letter clearly showed that the respondent/plaintiff rejected the offer to have the present case or matter tried in the sessions court and requested the applicant/defendant to make their application to transfer to the High Court.

[17] On the issue of delay, the respondent/plaintiff argued that the applicant/defendant was merely delaying the respondent/plaintiff's claim by filing the application in encl one (1) to transfer the proceedings presently pending in the Kuala Lumpur sessions court to the Kuala Lumpur High Court. The applicant/defendant took exception to this argument and pointed out that they – referring to the applicant/defendant, had sought the agreement of the respondent/plaintiff as far back as 16 January 2004 to have the present case or matter tried in the sessions court. If the respondent/plaintiff had agreed, the present case or matter would have proceeded expeditiously in the sessions court. Unfortunately, the respondent/plaintiff refused to agree to this proposal. It was for these reasons that the applicant/defendant was compelled to file these proceedings to transfer. To say that the applicant/defendant was delaying the trial of the respondent/plaintiff's claim was wholly misconceived and plainly wrong.

[18] It must be borne in mind that the respondent/plaintiff's claim was filed on 2 October 2002. The applicant/defendant then filed its defence and counterclaim immediately thereafter on 15 January 2003. That being the case, there was no basis whatsoever to say that the applicant/defendant did nothing for three years.

[19] For all these reasons, there was no legitimate basis for the respondent/plaintiff to oppose enclosure one (1). For the sake of completeness, it would be ideal to set out the law pertinent to the case at hand.

THE LAW AND THE FACTS THERETO

[20] For starters, I shall refer to s 65(1)(b) of the Subordinate Courts Act 1948 which enacts as follows:

> Civil Jurisdiction of Sessions Courts
>
> 65(1) Subject to the limitations contained in this Act, a Sessions Court shall have:
>
> (b) jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject-matter does not exceed two hundred and fifty thousand ringgit.

[21] Next, I shall refer to s 66 of the Subordinate Courts Act 1948 which enacts as follows:

> Counterclaims in Sessions Courts and transfers therefrom:
>
> 66 (1) Where in any action or suit of a civil nature before a sessions court any defence or counterclaim of the defendant involves matters beyond the jurisdiction of the court, the defence or matter shall not affect the competence or the duty of the sessions court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the court has jurisdiction to award shall be given to the defendant upon the counterclaim.
>
> (2) In any such case the High Court may, if it thinks fit, on the application of any party, order that the action or suit be transferred to the High Court, and the action or suit shall then be entered in the cause book or register of civil suits of the High Court, and proceeded with as if the action or suit had been originally instituted therein.

[22] Now, of crucial importance would be s 65 sub-ss (3) and (4) of the Subordinate Courts Act 1948 and I must reproduce them accordingly:

> 65 (3) When the parties to an action or suit which, if the amount in dispute or value of the subject-matter thereof did not exceed the limit of the jurisdiction, would be cognisable by a sessions court, have entered into an agreement in writing that the sessions court shall have jurisdiction to try the action or suit, the sessions court shall have jurisdiction to try the same, although the amount of the subject-matter thereof may exceed the value limit of jurisdiction.
>
> (4) Every such agreement shall be filed in the sessions court and, when it is so filed, the parties to it shall be subject to the jurisdiction of the sessions court.

[23] And these provisions clearly provide a mechanism whereby the parties can agree to have the sessions court try the said suit even if the counterclaim may exceed the sum of RM250,000. That is comforting news.

[24] In *Country Heights Marketing v Firstland Management* [1997] MLJU 339, the learned judge took the view that an application to transfer the case to the High Court would be premature if the applicant had not first sought the respondent's agreement pursuant to s 65(3) of the Subordinate Courts Act 1948. There, factually speaking, the defendant had commenced an action in the sessions court against the plaintiff claiming for the sum of RM100,000 for services allegedly provided. The plaintiff then filed its defence and counterclaim for damages amounting to RM482,47. The plaintiff also applied to have the whole matter before the sessions court transferred to the High Court on account that the amount of its counterclaim exceeded the value limit of jurisdiction of the sessions court.

[25] Here, before me, the applicant/defendant contended that the amount claimed under the counterclaim exceeded RM250,000 — the monetary limit prescribed to the sessions court. The amount claimed by the applicant/defendant in its counterclaim included the return of RM200,000 already paid to the respondent/plaintiff together with general damages for breach of contract. Pursuant to s 65(3) of the Subordinate Courts Act 1948, the applicant/defendant's solicitors had by way of a letter dated 16 January 2004 to the respondent/plaintiff's solicitors requested for the respondent/plaintiff's agreement to allow the sessions court to try the present case or matter even though the amount of the applicant/defendant's counterclaim may exceed RM250,000. Unfortunately, this proposal was rejected by the respondent/plaintiff via its solicitors' letter dated 19 January 2004. In the same letter too, the solicitors for the respondent/plaintiff informed the applicant/defendant to proceed with the filing of the application to the High Court. It was on this basis that encl one (1) was filed by the applicant/defendant on 20 January 2004 in order to transfer the said suit from the sessions court to the High Court. I have alluded to all these earlier on and I must be forgiven for repeating them once again. It was a necessary evil.

[26] Before me, the respondent/plaintiff vigorously opposed encl one (1). The respondent/plaintiff took the position that the said suit should not be transferred to the High Court. With respect, there was no basis at all for the respondent/plaintiff to take and adopt this stand. In my judgment, I must categorically hold that the applicant/defendant was entitled to have its counterclaim adjudicated upon in the right and proper forum. Indeed if the quantum of the applicant/defendant's counterclaim far exceeded the sum of RM250,000 the applicant/defendant cannot be shackled by the respondent/plaintiff. The High Court is indeed the right forum to adjudicate the applicant/defendant's counterclaim.

[27] It must be emphasised that the merits of the counterclaim are not the subject of the originating motion in encl one (1). This originating motion was nothing more than a procedural exercise. What should be an easy application turned out to be a complicated one. Simply put, encl one (1) sought to transfer the said suit to the High Court because the counterclaim may exceed RM250,000. I was not concerned, at this juncture, as to the merits of the counterclaim.

[28] It must be recalled that it was the applicant/defendant who had previously indicated that it would be willing to have the present case or matter be tried in the sessions court. The applicant/defendant sought the agreement of the respondent/plaintiff pursuant to s 65(3) of the Subordinate Courts Act 1948. It was the respondent/plaintiff who inexplicably refused the said request and instead requested the applicant/defendant to file encl one (1). Basically, encl one (1) was filed because the respondent/plaintiff refused to agree to the applicant/defendant's idea of allowing the sessions court to try the said suit.

CONCLUSION

[29] For all these reasons, I gave an order in terms of encl one (1).

Application allowed.

Reported by Peter Ling